***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

Original with affidavit of mailing.

# 75-1023

*To be argued by*
PAUL F. CORCORAN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75 Cr. 1023**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ERNESTO LOPEZ,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTREN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


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UNITED STATES OF AMERICA,

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*Appellant.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

Ernesto Lopez appeals from a judgment of the United States District Court for the Eastern District of New York (Platt, *J.*), entered on January 10, 1975, convicting him, on his plea of guilty, of one count of conspiracy to harbor illegal aliens in violation of Title 8, U.S.C., § 1324(a)(3) and Title 18, U.S.C., § 371.

On October 23, 1974, after eight days of trial before the Honorable Thomas C. Platt and a jury, appellant pleaded guilty to a superseding information * charging him with

* On August 21, 1974, the defendant, Ernesto Lopez, was charged in Indictment 74 Cr. 527 with twenty counts of harboring aliens in violation of Title 8, United States Code, § 1324(a)(3), and three counts of making false, fictitious statements to a government agency in violation of Title 18, United States Code, §§ 1001 and 1546. Thereafter, on September 19, 1974, two additional indictments, 74 Cr. 577 and 74 Cr. 580 were handed up charging the appellant respectively with two additional counts of harboring aliens and a conspiracy to obsruct justice. By agreement, the trial which began October 15, 1974 concerned only the 22 harboring counts. It was after eight days of this trial that appellant pleaded guilty to a two count Superseding Information, 74 Cr. 662. Appellate rights were reserved only as to Count 1 of that information.

conspiracy to harbor aliens in violation of Title 8, United States Code, Secton 1324(a)(3). With the permission of the Court, and with agreement of the United States, appellant was permitted to reserve his right to appeal the constitutionality of Section 1324(a)(3) as well as the definition of "harboring." On January 10, 1975, the defendant was sentenced pursuant to said plea to a prison term of four years and a fine of Ten Thousand Dollars ($10,000). Execution of sentence was stayed pending appeal.

On this appeal appellant questions the District Court's construction of the term "harbor", and the constitutionality of Section 1324(a)(3). It is argued that the section is "vague" and fails to give fair warning as to the proscribed conduct; and further that the employment exemption contained in Section 1324(a) is discriminatory and in violation of equal protection guarantees.

## Statement of Facts

For purposes of this appeal, the undisputed facts elicited during the case-in-chief are stipulated as true.

On July 23, 1974, appellant Ernesto Lopez was the record owner of at least eight single-family, suburban homes in the Levittown-Westbury area of Nassau Count, New York. On that day, investigators of the Immigration and Naturalization Service, Department of Justice, armed with federal search warrants, searched appellant's houses for illegal aliens. A total of twenty-seven (27) illegal aliens were found residing in six of the appellant's houses.* In pleading guilty to conspiracy to harbor aliens, appellant admitted that he had knowledge of the alienage of these individuals.

During the trial, some 13 of the illegal aliens testified concerning their relationships with appellant. Each told of living in Lopez' houses for periods varying from one week

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* A total of nine illegal aliens were found at 95 Hearth Lane, Westbury; six at 27 Summer Lane, Hicksville; four at 6 Salem Lane, Levittown; four at 29 Heather Lane, Levittown; two at 35 Water Lane, Levittown; and two at 44 Brittle Lane, Hicksville.

to several years. In each case the rent paid was $15.00 per week. Many of these aliens had come directly to appellant's houses from their illegal border-crossings, the addresses having been brought with them from El Salvador, Central America. (340, 351, 439, 445).*

In adition to receiving shelter or lodging from appellant, a number of the aliens testified that appellant found jobs for them, often times filling out their job applications. (20, 183, 304, 318, 341-42, 358-59). Transportation to work was also provided in vans carrying eight to ten aliens at a time (183, 359, 368). The Government introduced into evidence approximately 20 employment applications of illegal aliens which were identified by a handwriting expert as being written by appellant's hand.

Finally, two of the aliens, Gladys Lopez and Cipriana Joya testified that they had paid appellant $600 and $800 respectively to arrange marriages for them with United States citizens (43-44; 209-210). According to their testimony, appellant had suggested marriage as a method of obtaining legal status in this country. He indicated, in each case, that the marriage would be solely for purposes of making application for permanent resident status; and that the aliens would not actually consummate the marriages nor live with their "spouses". Both Gladys Lopez and Cipriana Joya testified that appellant arranged the marriages and either helped them prepare their Immigration applications or referred them to a laywer. The Government introduced into evidence the marriage license between Gladys Lopez and one Jose Ramon Oquendo, allegedly an United States citizen; the accompanying marriage license application was identified by the handwriting expert as being in appellant's handwriting. (Gov't Ex. 4) Neither Gladys nor Cipriana ever saw their respective spouses after their marriage ceremonies.

It was after the Government elicited the above facts and rested its case, that appellant plead guilty to conspiracy to harbor aliens.

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* Unless otherwise indicated, parenthetical page references are to the trial transcript.

# ARGUMENT

## POINT I

### The District Court properly held that the Section 1324 proscription against harboring aliens extends beyond the smuggling process.

The appellant initially contends that the statutory provisions of Title 8, United States Code, Section 1324 *

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* Section 1324(a) reads as follows:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

relate only to activities within the smuggling process. It is argued that absent evidence of some nexus with the smuggling of aliens into the United States, appellant cannot be convicted under section 1324. Relying on *Herrera* v. *United States,* 208 F.2d 215 (9th Cir. 1954), appellant contends that the entire section should be read as "one thought or sentence." Such a limited construction of section 1324 is clearly without support in either the language of the statute or its underlying legislative history.

In construing section 8 of the Immigration Act of 1917, the predecessor to section 1324, the Supreme Court in *Evans* v. *United States,* 333 U.S. 483 (1948), did note that the section, as originally enacted, was limited to acts of smuggling.* The 1917 addition thereto of the proscription against "concealing or harboring" ** of aliens may have been intended by Congress to apply only to those acts closely connected with the bringing in or landing of aliens. Under such a construction the statute would reach only those activities which form a "chain of offenses consisting of successive stages in the smuggling process" 333 U.S. at 488. However, the *Evans* Court found evidence of such an intention to be inconclusive, stating that

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* Section 6 of the Immigration Act of 1891 (26 Stat. 1084) punished as a misdemeanor anyone who brought in or landed "any alien not lawfully entitled to enter the United States."

**Section 8 of the Immigration Act of 1917 provided:

> "That any person . . . who shall bring into or land in the United States . . . [or shall attempt to do so] or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place . . . any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in." 39 Stat. 880, 8 U.S.C. § 144.

the "section's wording is susceptible of much broader constructions". In declining to remedy by judicial construction a defect in the penalty provisions of then § 144 of Title 8, U.S.C., the court never reached the issue. In dictum, however, the *Evans* court further noted the real possibility that in adding the proscription against "concealing or harboring" Congress may have intended to prohibit acts "disconnected from" the smuggling process. Indeed, the court recognized that "concealing" and "harboring" could well have "distinct" meanings. 333 U.S. at 489-490.

In response to the statutory deficiencies underscored by the *Evans* opinion, Congress made known its intentions in March of 1952, by adopting Public Law 283, Chap. 108, Laws of 82nd Cong, 2d Sess, entitled: "An act to assist in preventing aliens from entering *or remaining* in the United States illegally" (emphasis added). Both the title to Public Law 283 and the congressional reports underlying this remedial legislation make clear that the section was not merely aimed at the smuggling process, but that prevention of the *unlawful remaining* of aliens was equally contemplated.*

Some two months later, on June 27, 1952, Congress passed the Immigration and Nationality Act of 1952 which remains in effect today. Public Law 414, Chapter 477, Laws of 82nd Cong, 2d Sess. Section 274 thereof, now 8 U.S.C., § 1324, was in effect a verbatim re-enactment of Public Law 283. Prior to the adoption of that Act, the Senate debated the "harboring" provision here under consideration. In discussing the feasibility of striking the

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* House Rep No. 1377, 82nd Cong., 2nd Sess., sets forth the purpose of the legislation as to "overcome a deficiency in the present law making it an offense to harbor *or* conceal aliens who have entered this country illegally, *and to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally.*" (Emphasis added).

words "knowingly and wilfully" from before the phrase "conceal, harbor, or shelter from detection", the participants of the debate clearly revealed that "harboring" was intended by Congress to constitute a distinct crime, separate not only from the smuggling process, but from the crime of concealing as well.

The following are relevant excerpts from that debate:

Mr. Humphrey:

> Some time ago I joined the distinguished Senator from Illinois in an effort to tighten the wetback provisions. But section 274 of the pending bill is too much for any of us to accept without serious protest. Under our present laws, it is a crime "wilfully and knowingly" to harbor an alien who is illegally in the United States. The McCarran bill would strike the words "wilfully and knowingly" from the bill. Under present law, a person is guilty of a felony if he wilfully or knowingly harbors an alien who is an illegal entrant.
>
> The McCarran bill would strike out the words "wilfully and knowingly," and if one merely harbored an illegal entrant, he would be guilty of a felony. That is going quite a long way. It means, for example, that if some good soul should open his door in the cold of night and see standing before him a shivering, bedraggled person, and should offer him the comfort of his house for the evening, so that he would not perish from the cold or rain or storm, that good Christian act, that act of compassion, might result in the householder being charged with the commission of a felony.
>
> As I have said, this might apply to a hotel. Under the provisions of the bill, every single hotel would have to ask its guests for evidence that they were legally in the United States. Before long, we

would have to travel around with all kinds of official identification papers, which, by the way, is the practice in many countries of Europe. (98 Cong. Rec. 5319 (1952)).

* * * * *

Mr. Morse:

Do not misunderstand me. I do not quarrel with the conclusion of the Senator that, in order to make this point perfectly clear as to statutory intent, the words "wilfully or knowingly" should be included. I am merely trying to find out what the fair intent of the committee was. I assume that in the first instance, in this section, they are not seeking to go after the hotel owner or the private citizen who, as the Senator has pointed out, in keeping with Christian principles may take a refugee or alien into his home, not knowing that he is an alien or a refugee. (98 Cong. Rec. 5320 (1952)).

* * * * *

Mr. Morse:

I believe it is very clear that the section is aimed at stopping smuggling, and the first clause goes to transportation, but, after the transportation is completed any person who aids or abets the transportation by concealing or harboring an alien, no matter who he may be, is guilty. (98 Cong. Rec. 5321 (1952)).

* * * * *

Mr. Lehman:

But I believe that even with regard to transportation the word "wilfull' should be included.

As I say, we can only judge by what we read in the bill. The section would indicate, as the Senator from Minnesota has suggested, that if a poor devil comes to my house in the middle of the night and

> asks for shelter, and if I harbor him without determining that he is an illegally admitted alien, or if he goes to a hotel, as the Senator from Minnesota has stated, and the hotelkeeper does not determine that he is an illegally admitted alien, both of us would make ourselves liable under the bill. (98 Cong. Rec. 5321 (1952)).

It is obvious from the above, that, according to congressional thinking, the inclusion of the words "knowingly and wilfully" had a definite purpose. Without them, one who merely gave shelter or lodging to an individual, not knowing him to be an alien unlawfully in the country, would violate the statute. There is no indication in the debates that such a potential defendant would have been protected by his lack of participation in the smuggling process, nor by his failure to "conceal" the alien sheltered. It follows therefrom that such statutory limitations were not within the contemplation of Congress. Conversely, the subsequent inclusion of the words "knowingly and wilfully" evidence a congressional intent to subject to criminal penalty anyone who "knowingly and wilfully" gives shelter or lodging to an alien unlawfully in the United States. Such a construction is consistent with the expressed congressional intent to prevent the *unlawful remaining* of illegal aliens.

That the provisions of § 1324(a) relate to activities beyond the smuggling process may also be derived from the statute itself. Thus, paragraph (2) of Section 1324(a) prohibits the transportation of an alien unlawfully in the country within three years of his illegal entry. While the transportation of an alien some two or three years after entry may be "in furtherance of" his unlawful remaining in the United States, such transportation, being so removed from the initial entry, cannot reasonably be considered a part of the smuggling process. Accordingly, it is clear that paragraph (2) is not restricted to activities within "the smuggling process."

Similarly evidencing congressional intent is the inclusion in § 1324(a) of the employer exemption. Under the provisions of 1324(a), an employer is exempt from the coverage of the "harboring" provision insofar as his employment of illegal aliens, or other activities "usually or normally" related thereto. The inclusion of such an express exemption evidences a congressional belief that absent such an exemption, employment would have fallen within the term "harboring". Clearly, the employment of an alien unlawfully in the United States would be unrelated to "the smuggling process". Were the intended reach of the section limited to the "smuggling process", the employer exemption would be wholly unnecessary.

Appellant's reliance upon *Herrera* v. *United States,* 208 F.2d 215 (9th Cir. 1953), *cert. denied,* 347 U.S. 927 (1954) is misplaced. Far from suggesting that Section 1324(a) is to be construed as "one sentence" or "one thought", as appellant maintains, the *Herrera* court sought to distinguish the various paragraphs, noting that paragraph (1) of Section 1324 "relates to the activity of smuggling aliens into the United States," while paragraphs (2) and (3) relate to the transporting or harboring of aliens unlawfully within the country, 208 F.2d at 217. Indeed, to avoid reaching a challenge to the constitutionality of the section, the *Herrera* court stressed the distinction between the "transporting" and "harboring" provisions.*

That Congress intended to proscribe the *unlawful remaining* of aliens, as well as the smuggling in thereof, does

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* It was in this context that the *Herrera* court sought to define the term "harbor": "The verb "harbor" is defined by Webster (New Int. Dict. 2nd Ed., Unabridged) as: "To afford lodging to; to entertain as a guest, to shelter, to receive, to give refuge to; to contain; to indulge or cherish (in thought or feeling);—now usually with reference to evil, esp. unlawful, act or intent." 208 F.2d at 218, fn. 4.

not admit of doubt. Clearly, then paragraphs (2) and (3) of 1324(a) should be broadly construed to effect that end. A statute should "not be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context". *Lamar* v. *United States,* 241 U.S. 103, 112 (1916); *United States* v. *Barnow,* 239 U.S. 74, 76 (1915). The narrow construction of § 1324 proferred by appellant is without support and should therefore be rejected.

## POINT II

### The District Court properly found defendant's activities to be within the framework of Section 1324(a)(3).

Appellant next urges that the undisputed facts, as evidenced by the trial record, fail to establish a violation of 1324(a)(3). Conceding that he knowingly and wilfully gave shelter and lodging to aliens known to be unlawfully in the United States, appellant contends that the term "harbor", as set forth in paragraph (3), necessarily connotes a surreptitious or clandestine concealing or secreting. Such concealment, it is claimed, was not present in appellant's "landlord-tenant" relationship with the aliens. (Citing *Susnjar* v. *United States,* 27 F.2d 223 (6th Cir. 1928); *United States* v. *Mack,* 112 F.2d (2d Cir. 1940). Once again, appellant's argument lacks support in either the language of the statute, the legislative history thereof, or the record on appeal.

As noted above, one of the primary goals of section 1324 is the prevention of the unlawful remaining of illegal aliens in the United States. On this premise, submit that the trial court properly construed the term "harbor" to mean "to afford lodging to, to shelter, or to give refuge to", see, *Herrera* v. *United States, supra,* 208 F.2d at 218, fn. 4. To engage in any of those activities would be to aid and abet

illegal aliens in remaining in the United States unlawfully. Only this construction would comport with the congressional intent as expressed in the 1952 Senate debates referred to above. There, the participating Senators made clear their intention that a home owner or hotel operator who "knowingly and wilfully" shelters an illegal alien would violate Section 1324(a)(3).

Moreover, the language of the statute itself supports a distinction between the crimes of "concealing" and "harboring" illegal aliens. The phrase "conceal, harbor or shelter from detection", is itself set in the disjunctive. Furthermore, Congress emphasized the distinction between "harboring" and "concealing" in its proviso exempting employers from the operation of the "harboring" provision. As noted above, section 1324(a) expressly provides that the employment of an illegal alien shall not constitute "harboring". While an employer found to have illegal aliens knowingly in his employ would not be in violation of Section 1324(a), the concealment of those same aliens, or the shielding of aliens from agents of the Immigration and Naturalization Service, would, the Government submits, subject the employer to prosecution for "concealing" or "shielding from detection".

The very inclusion of the employer exemption in Section 1324(a) is of twofold significance. It not only evidences the congressional distinction between "harboring" and "concealing", but more importantly, it is indicative of the very parameters of the harboring provision. Since Congress felt it necessary to include such an express exemption for employment, it must be concluded that in the absence of such a proviso, empoyment of illegal aliens would have constituted "harboring". To that extent, then, the nature and scope of the "harboring" provision is revealed. Again, were "harboring" limited to surreptitious, clandestine or secretive activities, the employment exemption would be wholly superflous.

Nor does appellant's narrow construction of the "harboring" provision of Section 1324(a) find much support in case law. While the Sixth Circuit, in *Susnjar* v. *United States,* 27 F.2d 223, 224 (6th Cir. 1928), did "conceive" the "natural meaning of the word 'harbor' to be to clandestinely shelter, succor, and protect improperly admitted aliens," that court is alone in its constrictive interpretation of the term "harbor" as it applies to this section. Moreover, *Susnjar,* a 1928 case wherein the defendant was charged with "concealing *and* harboring" aliens, finds no support in *Evans,* in which the Supreme Court, in 1948, expressly left unresolved the scope of the harboring provision.

Contrary to appellant's opinion, *United States* v. *Mack,* 112 F.2d 290 (2d Cir., 1940), lends no weight to his position. There, Judge Learned Hand, writing for the Court, considered the sufficiency of evidence in support of a harboring charge against Mack, the "keeper of a brothel". Garrie, one of the prostitutes "maintained" in Mack's brothel, was a Canadian illegal alien. The question which concerned the Court was Mack's knowledge of Garrie's alienage. Significantly, the Court made no mention of the fact that Garrie was neither concealed nor secreted as an illegal alien. Indeed, it can be assumed that, to the contrary, public access to Garrie, a prostitute, was made available by Mack. Finding insufficient evidence that Mack knew of Garrie's status, the court proclaimed: "It would be shocking to hold guilty anyone who gave shelter to an alien whom he supposed to be a citizen." While Judge Hand did note that the word " 'harbor' alone often connotes surreptitious concealment," the opinion in no way indicated that such concealment was a prerequisite to conviction for harboring. Rather, that reference was merely supportive of the court's holding that one giving shelter without

knowledge of alienage is not in violation of the harboring provision.*

While the term "harbor" may, by its particular use, assume a connotation of concealment, it may under other circumstances connote the mere sheltering or lodging of an individual. It is the statutory purpose which controls this distinction.** As was stated in *United States* v. *Grant,* 55 Fed. 414, 415 (1893), *rev'd on other grounds,* 58 Fed. 694 (1893):

> Various shades may be found for the word to "harbor", and, while it may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, it may also, under certain circumstances, be equally applicable to those acts divested of any accompanying secrecy. In the statute under consideration the inhibition is against both harboring and secreting. The intention evidently was to declare unlawful other acts than the mere concealment of deserting seamen. In view of

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* *See also United States* v. *Smith,* 112 F.2d 83 (2d Cir. 1940), in which the conviction of a "brothal keeper" was upheld by this Court. After noting that the defendant was charged with the "improper maintenance" of the prostitute aliens, the court held that appellant had clearly harbored the aliens. In the context of this section, the term "harbor" was held mean to shelter from immigration authorities. The court relied upon the fact that appellant had told the prostitutes not to reveal to anyone that they were Canadians. While such a statement evidences knowledge on the part of the defendant that he was giving shelter to illegal aliens, the statement alone could not turn an otherwise lawful sheltering into an illegal concealment.

** Compare Title 18, United States Code, Section 1071. There the term "harbor" has been defined to mean "to lodge, to care for after secreting the offender". *United States* v. *Foy,* 416 F.2d 940 (7th Cir. 1969); *United States* v. *Thornton,* 178 F. Supp. 42, 43 (EDNY 1959). Unlike the instant section, however, the very purpose of Section 1071 is to prevent the concealment of fugitives who are being sought for arrest.

> the language used and the evils intended to be corrected by the statute, the reasonable interpertation of its terms would be to hold that the penalty therein provided is denounced, not only against all persons who conceal and secret deserting seamen, but against all persons who furnish them food, shelter, or aid with the intent thereby to encourage them to continue in their violation of the law.*

The instant statute, like that construed in *Grant,* has not as its sole purpose the arrest of the aliens, but it is also intended to discourage them from unlawful remaining in this country. Were the mere arrest of aliens contemplated, the term "harbor" would more logically be construed to include the concealment or secreting of those sought to be arrested. Given the expressed congressional intent, however, it must be assumed that Congress also intended to penalize those who encourage the unlawful remaining of aliens by providing them with food, shelter or lodging.

Finally, it should be noted, that appellant's conduct was not limited to sheltering and lodging illegal aliens. Notwithstanding his contention, Ernesto Lopez was not merely a participant in an open, landlord-tenant relationship with the El Salvadorian aliens living in his many houses. Beyond providing shelter, a prerequisite to the aliens' illegal remaining in this country, Don Ernesto, as

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* In *Grant,* the defendant was charged with "harboring" deserted seaman. Section 4601, Rev. St. U.S., under which he was charged, provided as follows:

> Sec. 4601. Whenever any person harbors or secrets any seamen, belonging to any vessel, knowing him to belong thereto, he shall be liable to pay ten dollars for every day during which he continues to so harbor or secret such seamen . . .

Grant, who ran a boarding house, had given rooms to seamen he knew to have deserted a British ship. His conviction was later reversed on the ground that the section only applied to deserters from U.S. ships.

Lopez' aliens named him, would also find jobs for them (183, 304, 341, 358); fill out their employment applications (183, 304, 342, 359)*; transport them to work (183, 359, 368); and, on at least two occasions, arrange sham marriages in order that they might make fraudulent applications to the Immigration and Naturalizations Service for permanent resident status (43-44, 209-210). Given the totality of his efforts in this country, it is specious to argue that the appellant was not "harboring" aliens in violation of 8 U.S.C. § 1324(a)(3).

## POINT III

### Section 1324(a)(3) is narrow and precise on its face and gives fair warning of the conduct prohibited.

Under the rubric of "vagueness", appellant next challenges the constitutionality of the district court's construction of the term "harbor". Quoting extensively from *Bouie* v. *Columbia,* 378 U.S. 347 (1964), appellant argues that he was denied due process of law when the statute, concededly narrow and precise on its face, was retroactively expanded by judicial construction to proscribe conduct—*i.e.,* the sheltering or lodging of illega aiens—which, it is caimed, appellant could not reasonably have foreseen to be within the ambit of the statute at the time of his conduct. In light of the Supreme Court's opinion in *Evans, supra,* and subsequent congressional action, appellant's argument is without merit.

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* In at least two employment applications which appellant filled out, *i.e.* for illegal alienes Jose Sanchez (Gov't Ex. 38) and Francisco Florese (Gov't Ex. 14), misleading information was supplied with regard to U.S. citizenship. On the Sanchez application, appellant checeked a box questioning "U.S. Citizen?" On the Flores application, appellant placed a single X through the "yes' ' and "no" box.

In *Bouie,* the Supreme Court, analogizing to the "void for vagueness doctrine," held violative of due process any "unforeseeable and retroactive judicial expansion of narrow and precise statutory langauge." 378 U.S. at 352. In holding due process of law to require fair notice of the criminal nature of an activity, the Court held that a judicial construction which *unexpectedly* brings within the realm of criminality activity which is not encompassed by the language of the statute on its face, may not be given retroactive application. The question is thus one of "fair warning"; such an expansive judicial construction may, of course, be applied prospectively, 378 U.S. 362. *See also Douglas* v. *Buder,* 412 U.S. 430, 432 (1973).

The defendant's in *Bouie* were convicted under a statute which, by its terms, prohibited only "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry . . . " Section 16-386 of the South Carolina Code of 1952 (1960 Cum. Supp.). The evidence established that the defendants, two Negro college students, had entered and seated themselves at a restaurant which, in fact, was "reserved for whites." No signs or notices were posted indicating the discriminatory policy. Only after waiting some time to be served were the defendants told that they were "trespassing." After they refused to depart they were arrested for, charged with and convicted of violating Section 16-386. In affirming the conviction, the South Carolina Supreme Court relied upon an interpretation of Section 16-386, post-dating defendants' conduct, which held that " 'entry . . . after notice' includes remaining after being asked to leave" 379 U.S. at 357.

In reversing the conviction, the United States Supreme Court noted the failure of the South Carolina courts to so interpret the statute prior to the date of the defendants' conduct. Since the retroactively applied interpretation was "so clearly at variance with the statutory language" and "[had] not the slightest support in prior South Carolina

decisions", 378 U.S. at 356, it was analogized to an impermissible an "ex post facto law". Id. at 362.

The instant case is clearly distinguishable. Appellant was not the subject of an "unexpected" judicial construction, retroactively applied. Unlike *Bouie,* appellant's conduct falls within the plain meaning and import of the statutory language of Section 1324(a)(3). Indeed, in *Evans* v. *United States, supra,* the Supreme Court stated that harboring an alien might well be a crime separate and distinct from the "smuggling process" or the concealing of aliens. And, any doubt on this score was eliminated in 1952, when Congress stated its intention to prohibit the "unlawful remaining" of aliens in the United States by penalizing those who "knowingly and wilfully" gave shelter to illegal aliens.* (See Senate debates, 98 Cong. Rec. 5319-5321 (1952)).

Finally, as noted above, appellant's activities were not limited to the sheltering and lodging of illegal aliens. The evidence established that appellant's involvement with the illegal aliens included the following: finding them jobs, filling out employment applications; transporting them to their employment; arranging sham marriages in furtherance of fraudulent applications for permanent resident status. All these activities were aimed at the maintenance of the illegal aliens in the United States. Under these circumstances, it can not be argued that appellant had not fair warning that his conduct was criminal.

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* Actually, the criminal nature of defendant's activities could be gleaned from case law as early as 1940. In *United States* v. *Mack,* 112 F.2d 290 (2d Cir. 1940), the court considered a harboring charge where evidence of the defendant's knowledge of alienage was absent. In holding knowledge of alienage to be an essential element of the harboring charge, the court implied that sheltering someone known to be an alien would violate Section 1324(a)(3), stating: "It would be shocking to hold guilty anyone *Id.* at 291. See also *Herrera* v. *United States, supra,* 208 F.2d 215, 218 (9th Cir. 1954).

## POINT IV

### The District Court properely denied appellant's motion to overturn Section 1324 as violation of equal protection guarantees.

Appellant's last point is totally frivolous. Citing *Bowling* [*sic*] v. *Sharpe,* 347 U.S. 497 (1954), it is argued that appellant was "denied the equal protection of law under basic concepts of fairness and equal protection as judicially applied." (App. br. at p. 21).

Since the challenged statute is federal rather than state, the equal protection clause does not apply. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Herrera* v. *United States, supra,* 208 F.2d at 218 (Concurring opinion, Pope, *J.*). However, as noted in *Bolling,* "discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499.

The appellant fails to evidence any discrimination which could be found to violate due process. Irrespective of the wisdom of exempting employment from the "harboring" provision insofar as the effective stemming of the alien influx is concerned, Congress has created no discriminatory classifications in delimiting the proscribed activities. All are precluded from sheltering illegal aliens; no one may be prosecuted for employing them. Analogizing to the constitutional strictures surrounding state action, the Constitution "does not require that [the Congress] must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970).

Nor can the distinction between the proscribed activity and the exempted employment be found to be without a rational basis. As Judge Platt noted, it may well be that Congress felt employers, who deal with large numbers of

people, are without the same capacity to determine alienage, or should otherwise be relieved of the disruptive burden of defending their lack of knowledge. In any event, there exists in the distination no invidious discrimination which would justify invalidating the statute as a whole.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Dated: April 4, 1975

Respectfully submitted,

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

PAUL F. CORCORAN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 7th day of April 1975 he served two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

O'Hagan, Reilly & Gorman, Esqs.
444 Main street
Islip, N. Y. 11751

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

PAUL F. CORCORAN

Sworn to before me this
7th day of April 1975